

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR**

D. B. CIVIL SPECIAL APPEAL NO. 13/1989

The Aligarh Muslim University
V/s
Syed Mohammad Sayeed Chishty & Ors.

Date of Judgment: 9th May 2007

Hon'ble Mr. Justice R. M. Lodha
Hon'ble Mr. Justice R. S. Chauhan

Mr. A. K. Bhandari, Sr. Advocate with
Mr. Rizwan Ahmed for the Appellant.
Mr. A. K. Sharma for the Respondent Nos. 1 and 2
Mr. M. M. Ranjan for the Respondent No. 3.

(Per R. S. Chauhan J):

The dedication of a property to the Almighty God—the creation of a wakf—has triggered off legal disputes amongst mortals and Institution. The appellant, the Aligarh Muslim University, has challenged the Judgment dated 7-4-1988 passed by a learned Single Judge of this court, whereby the learned Single Judge had quashed and set aside the Judgment and decree dated 8-2-1978 passed by the Additional District Judge, Ajmer, wherein the learned trial court had decreed the

suit in favour of the appellant.

This case has a convoluted history: one Hakim Nizamuddin (henceforth to be referred to as 'Hakim Sahab', for short), an experienced physician and a devout Muslim, owned a three-storied building at Gali Langar Khana, opposite the Dargah Sharif at Ajmer. The building included not only shops, but also three libraries, which housed costly books and a "dawa khana" (clinic) of the Hakim Sahab. Being a religious man, on 6-7-1942, Hakim Sahib executed a "wakf alal-aulad" (family wakf) (Ex. 4) with regard to the three-storied house (henceforth to be referred to as 'the suit property', for short). For the sake of clarity, this Wakfnama shall be referred to as 'the 1942 Wakf'. According to the wakif (the creator of the wakf)--Hakim Sahab, the said wakf was to be governed by the Hanafi School of Muslim Law. Hakim Sahab was to be the first Mutawalli (Manager or superintendent of the property) and after him, his eldest son, Hakim Nasiruddin, was to be the next Mutawalli. After his son Hakim Nasiruddin, the Mutawalli would be chosen by lots from the families of Hakim Sahab's male issues. Thus,

the succession of Mutawalli was fixed. Hakim Sahab did not retain any power to change the said line of succession of Mutawallis. The usufruct of the suit property was to be used by Hakim Sahab during his lifetime. The method of spending the profit from the clinic was also spelt out. But we shall deal with this aspect later in the judgment at the appropriate place. The 1942 Wakf was not only registered, but was also published in the Official Gazette dated 23-9-1965 (Ex. 3).

However, the partition of the country in 1947 changed the scenario. With the partition, Hakim Sahab's children—three sons, including the eldest son, Hakim Nasiruddin, and daughters—migrated to Pakistan. Since the sons migrated to Pakistan, since the succession of Mutawalli as contained in the 1942 wakf could not be implemented, on 30-6-1952, Hakim Sahab created a trust deed (Ex. 5) wherein he changed the succession of Mutawalli: Hakim Sahab would continue to act as a Mutawalli during his lifetime, but after him, Smt. Zohra Begum, the great-granddaughter of his sister, Mst. Kulsum Begum, was to succeed as the next Mutawalli.

But after sixteen years, Hakim Sahab again changed his mind. On 15-7-1966, he executed a will (Ex. 14) in favor of the appellant. According to the said will, the entire suit property was to go to the appellant after Hakim Sahab's death. The income from the property was to "be spent in giving the Scholarship to deserving student of Tibiya College in the Muslim University." However, since the Islamic Law permits only 1/3rd of the property to be transferred as a gift through a will, the appellant could see the legal difficulties in the said will. Therefore, they contacted Hakim Sahab and sent their employee, Mohammad Ahsan (P. W. 8) and their lawyer, Haji Hassan Abedi (P.W. 10) to convince Hakim Sahab to change the Will and to create another document in favor of the appellant. Therefore, on 28-9-1966, Hakim Sahab created another wakf in favor of the appellant. For the sake of clarity this wakfnama shall be referred to as 'the 1966 wakf'. This wakf was intervivos. During his lifetime, Hakim Sahab was to be the Mutawalli and after him, the appellant. The profit earned from the clinic was to pay for the education of "the deserving and the needy Muslim

students of the Tibbia College in the Muslim University Aligarh”.

However, two years later, on 14-4-1968 Hakim Sahab created yet another will (Ex. 15) in favor of one Gaffar Khan (respondent No. 10 before us) with regard to the suit property. According to the said will, Hakim Sahab revoked the 1966 wakf and made the will in favor of Gaffar Khan. But, just after two months, on 5-6-1968, Hakim Sahab cancelled his earlier will and the 1966 Wakf and executed yet another will (Ex. A/9) in favor of Respondent No. 1. Respondent No. 2 was appointed as the executor of the will. On the same day, i.e. 5-6-1968, Hakim Sahab also executed a General Power of Attorney (Ex. D 10/1) in favor of the respondent No. 1. Just four days later, Hakim Sahab migrated to Pakistan and died there on 12-12-1968. With his death, the legal disputes erupted.

The appellant filed a civil suit, registered as Civil Suit No. 77/ 1970 (later on renumbered as 9/1971), for possession, accounts, recovery of rent, for pendentialite cost and damages for use and occupation of the suit property. For sake of clarity,

the respondents shall be referred to as referred to in the civil suit filed by the appellants. According to appellant, in accordance with the 1966 wakf, after the death of Hakim Sahab, the appellant had become the Mutawalli of the suit property. Therefore, they had a right to manage and supervise the suit property. They also had to spend the income of the property for the deserving and needy Muslim students of Tibbia College as directed by the wakif, the Hakim Sahab. Therefore, the appellant prayed for decree of possession of the suit property, decree of arrears of rent against respondent Nos. 3 to 7, damages against respondent Nos. 1 and 2, decree of redemption on account of the clinic being run by the respondent Nos. 1 and 2 and lastly, a decree for pendentialite and future damages.

The respondent Nos. 1 and 2 filed their written statement and claimed that the appellant had gotten the 1966 wakf made from the Hakim Sahab by misrepresenting and by using undue influence over him. According to them, Hakim Sahab never wanted to create a wakf of the suit property in favor of the

appellant. He only wanted to will the property the property in favor of the university. However, by drafting the 1966 wakfnama in English, by creating an impression upon him that only a will was being drafted, the appellant cleverly created a wakf in their own favor. The respondent Nos. 1 and 2 further claimed that Hakim Sahab was not mentally and physically fit to understand the tenor of the document. Moreover, when the 1966 wakf was created, Hakim Sahab did not have access to anyone except the persons who came from the Aligarh Muslim University. Thus, they exercised undue influence over him. Hence, as the wakfnama was procured by misrepresentation and under undue influence, the 1966 wakf is void. The respondent Nos. 1 and 2 further claimed that Hakim Sahab had repudiated the said 1966 wakf by sending a notice on 27-8-1968 (Ex. A/1) to the appellant. Moreover, afterwards, Hakim Sahab had executed a will in favor of the Respondent Nos. 1. Therefore, the respondent Nos. 1 had the right to occupy the suit property and to realize the rent from the other tenants. The other respondents, namely respondent Nos. 3 to 10 have supported the case of respondent Nos. 1 and 2. Therefore, their stand

before the learned trial court is not being mentioned here.

Meanwhile, Smt Zohra Begum also filed a civil suit, registered as Civil Suit No. 79/ 1970 (later on renumbered as Civil Suit No. 10/71), for declaration, possession, accounts, recovery of rent and damages for use and occupation of suit property against the Respondent Nos. 1 and against the appellant. According to her, the 1942 wakf was a valid wakf. Subsequently, Hakim Sahab had created a trust deed in her favor on 30-6-1952 (Ex. 5, in her suit). According to the said deed, after his death, she was to act as the Mutawalli. Hence, she had a right to have herself declared as the Mutawalli, to supervise and manage the suit property and to recover the possession, the rent and account of rent and the cost of damage caused to the suit property by the respondent Nos. 1 and the appellant. In her suit, Smt. Zohra Begum had examined herself and three other witnesses. However, vide order dated 3-10-1972, the two suits were consolidated and the suit filed by the appellant was made the leading suit.

After consolidating the civil suits, the learned trial court had framed thirteen issues. In order to support their case, the appellant had examined eleven witnesses and had produced a number of documents. In order to buttress their case, the respondent Nos. 1 and 2 had examined eight witnesses. After going through the oral and documentary evidence, including the oral and documentary evidence produced in the civil suit filed by Smt. Zohra Begum, through a common Judgment, Judgment dated 8-2-1978, the learned trial court, decreed the suit in favor of the appellant, but dismissed the suit filed by Smt. Zohra Begum.

Since the respondent Nos. 1 and 2 were aggrieved by the said judgment, they filed a Civil First Appeal before this court. Although Smt. Zohra Begum did not file an appeal against the judgment dated 8-2-978, she did file her cross-objections. Vide judgment dated 7-4-1988, the learned Single Judge quashed and set aside the judgment dated 8-2-1978 passed by the learned trial court, but dismissed the cross-objections filed by Smt. Zohra Begum. Hence, this appeal and the cross-objection

before this court.

Mr. A. K. Bhandari, Sr. Advocate and the learned counsel for the appellant, has raised a plethora of contentions before us. Firstly, he has attacked the validity of the 1942 wakf. According to him, the said wakf is illusory and suffers from uncertainty and vagueness. It is illusory as a negligible amount of the profit earned from the clinic is to be spent on charity. The substantial amount, on the other hand, is to be utilized by the wakif himself during his lifetime and by his male descendants, generation after generation. It is uncertain, as the wakf deals only with profit earned from the clinic. But, it is conspicuously silent about the earning from the other parts of the suit property, i. e. from the shops and from the rent received from the tenants of the building. It is also vague, as it has not specified the purpose for which the money is to be used. It has left the utilization of the money up to the discretion of the Mutawalli (Trustee) of the Dargah Sarraf of Ajmer. It has used the term, "Madd-e-khair" which means 'for good works'. However, the earnings of a wakf are to be used only for

'religious, pious and charitable work'. According to the learned counsel, there is a distinction between 'good works' and 'religious, pious and charitable work'. A good work need not necessarily be pious or charitable or religious work. Hence, the 1942 wakf suffers from the vice of being illusory, uncertain and vague.

Secondly, the trust deed dated 30-5-1952 (Ex. 5), created in favor of Zohra Begum, is equally invalid. For, in the 1942 wakf Hakim Sahab had fixed the line of succession of Mutawalli. Accordingly, after his death, his eldest son was to be the next Mutawalli; after him, the Mutawalli was to be chosen, by lots, by the families of male descendants of Hakim Sahab. In case the male line was to become extinct, the Mutawalliship would go to the female line. In case they too become extinct, the Mutawalliship would pass to Mutawalli (Trustee) of Dargah Khwaja Saheb, at Ajmer. Therefore, Hakim Sahab did not retain the power to subsequently change the Mutawalli. Thus, he could not have changed the line of Mutawalli through the trust deed dated 30-5-1952 in favor of Zohra Begum. Moreover,

since Smt. Zohra Begum was the great-granddaughter of Hakim Sahab's sister, since she was not a descendent from his sons, she could not be appointed as the Mutawalli. Further, Smt. Zohra Begum had challenged the judgment of the learned Single Judge by filing of a special appeal, registered as D. B. Special Appeal No. 58/93. However, vide judgment dated 25-3-1993, this court had dismissed her special appeal. Therefore, she cannot file her cross-objections in the present appeal. For, her cross-objections are hit by res judicata. Lastly, she has filed her cross-objection in the present appeal after an inordinate delay of eleven years, whereas according to Order 41, Rule 22 of the Code of Civil Procedure ('the Code', for short), she should have filed the cross-objection within one month of the receipt of the notice. She has not filed any application for condoning the delay. Hence, she cannot be heard, as she has no locus standi to contest the present appeal.

Thirdly, the learned Single Judge has erroneously concluded that 1966 wakf was the product of misrepresentation and undue influence. There is no evidence to substantiate this

conclusion. The series of events clearly prove that Hakim Sahab wanted to create a wakf in favor of the appellants. Initially, without any fear or inducement, Hakim Sahab had executed a will in favor of the appellant. When the legal infirmities were pointed out to Hakim Sahab and when the appellant sought an appointment with him, he gave the appointment. Consequently, Mohammad Ahsan (P. W. 8) and Haji Hasan Abedi (P. W. 10), the appellant's lawyer, arrived at Hakim Sahab's house in Ajmer. They discussed the matter with him. According to P. W. 3, Mohammad Islamullah, Hakim Sahab was mentally fit when the 1966 wakf was created. According to him, although the wakfnama was drafted in English, though Hakim Sahab was unfamiliar with English, yet the wakfnama was translated in Urdu and read over to him. Hakim Sahab had sent Mehboob Khan (D. W. 2) to bring the necessary stamp papers for the drafting of the wakfnama and had sent him to fetch the Sub-Registrar so the said wakf could be registered. Hakim Sahab had signed the wakfnama in front of the witnesses. The said wakfnama was registered. Hence, there is not an iota of evidence to either suggest

misrepresentation or undue influence. Hence, the 1966 wakf is a valid one.

Fourthly, the learned Single Judge has applied the doctrine of legal infirmity. However, in the present case, the said doctrine is inapplicable. Hence, the basis of the impugned judgment is misplaced.

Lastly, since the 1966 wakf is valid, thereafter Hakim Sahib as the first Mutawalli did not have the right to create a will about the suit property. For, after a wakf is created, the wakif loses his ownership and merely has the right to supervise or to manage the suit property as a Mutawalli. Hence, Hakim Sahab could not have willed the suit property in favor of the respondent Nos. 1. Thus, the will dated 5-6-1968 is invalid; the respondent No. 1 cannot derive any right or interest on the basis of an illegal will.

On the other hand, Mr. A. K. Sharma, the learned counsel for the respondent Nos. 1 and 2, has supported the impugned

judgment. Firstly, Hakim Sahab never wished to part with the suit property during his lifetime. It is precisely for this reason that he had executed a will, dated 15-7-1966 (Ex. 14), in favor of the appellant. It was not the Hakim Sahab who felt the need for changing the will. The appellant felt the said need, as under the will the appellant would be entitled to only 1/3rd share in the suit property. Therefore, the appellant sought an appointment with the Hakim Sahab. The appellant sent one of their employees and their lawyer to get the will changed into a wakf in favor of the appellant. Secondly, according to D. W. 2, Mehboob Khan, Hakim Sahab's employee, when the people from Aligarh came, Hakim Sahab was not well and he simply signed the document. Also according to him, the persons from Aligarh had brought a draft of the wakfnama with them. Thirdly, no one close to Hakim Sahab was present when he signed the wakfnama. But for the testimony of the appellant's witnesses, no one testifies that the wakfnama was read over to the Hakim Sahab before he signed it. Thus, the undue influence and misrepresentation is writ large. Fourthly, in his statement given on 29-3-1967 (Ex. A/10), before the Small Cause Court, Hakim

Sahab repudiated the suggestion of having created any wakf in his property in his lifetime. According to him, he had created a will in favor of the appellant. Thus, he was under a bona fide belief that the document he had signed on 28-9-1966 (Ex. 4) was a will and not a wakfnama. Fifthly, on 5-6-1968 he had sent a notice (Ex. A/14) to the appellant repudiating the will dated 15-7-1966 (Ex. 14) and the wakf dated 28-9-1966 (Ex. 4) created in favor of the appellant. Sixthly, in the will in favor of the respondent No. 1, dated 5-6-68 (Ex. D. 9), Hakim Sahab has unequivocally stated that the appellant and his employee and lawyer had misguided him into entering into the wakf in favor of the appellant. These facts, according to the learned counsel, establish that the Hakim Sahab had no intention to part with the suit property by creating a wakf in favor of the appellant.

The learned counsel has also argued with regard to the 1942 wakf. According to the learned counsel, the 1942 wakf is valid. Since a valid wakf was created in 1942, Hakim Sahab could not have created a wakf in 1966 with regard to the same

property. Therefore, also on this account, the 1966 wakf was illegal.

Mr. M. M. Ranjan, the learned counsel for Smt. Zohara Begum, has also raised a number of contentions before us: Firstly, even if Smt. Zohra Begum had not filed an appeal against the judgment dated 8-2-1978, under Order 41, Rule 22 of the Code, she was competent to file her cross-objections. However, vide judgment dated 7-4-1988, her cross-objections were rejected without hearing her. Subsequently, she had filed a special appeal, registered as D. B. Special Appeal No. 58/93; however, this court had dismissed the same vide judgment dated 25-8-1993 on the ground of limitation. Since her special appeal was dismissed on ground of limitation, the judgment dated 25-8-1993 cannot act as res judicata. In the present appeal, she has filed her cross-objections and under Order 41, Rule 22 of the Code. Moreover, she is competent to support the impugned judgment. Hence, she has a locus standi before this court.

Secondly, supporting the 1942 wakf, he has argued that the said wakf does not suffer from being illusory, uncertain, or vague. According to him, the maintenance of one's family is itself a charitable act according to Islamic jurist. Since a substantial part of the money would have been spent on the family, the charitable purpose is writ large in the 1942 wakf. Hence, it is not illusory. Similarly, the division of the money has been prescribed in the wakfnama. Thus, there is nothing uncertain or vague about it.

Thirdly, the learned trial court had relied upon series of cases, which are contrary to the Muslim law and the principles established by the Islamic Jurists. Without appreciating the requirements of a valid wakf, without noticing the principles of Hanafi School of law, the learned trial court has erroneously held the 1942 wakf to be illusory, uncertain and vague in nature. Even the learned Single Judge had overlooked this position.

Fourthly, the 1942 wakf was registered and notified on

23-9-1965 (Ex. 3). According to Section 6 (4) of the Wakf Act, 1954 ('the Act of 1954', for short), once the wakf is registered, the wakf is said to be final and conclusive. Since the 1942 wakf was registered, a presumption can be drawn that the wakf was valid in accordance with the requirement of Islamic laws.

We have heard the learned counsels for the parties, have examined the record produced before us and have perused the impugned judgment.

Before dealing with the issues raised in this case with regard to the validity of 1942 wakf and the 1966 wakf, let us first deal with the issue of maintenance of cross-objection filed by Smt. Zohra Begum. Order 41, Rule 22 of the Code is as under:

- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the

appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[Explanation: A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent]

- 2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.
- 3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.
- 4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the to her parties as the Court thinks fit.

- 5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

An analysis of the provision reveals that it consists of two parts: the first part empowers any respondent, who may not have appealed from any part of the decree, to support the decree and to plead that a finding of the court below which is against him/ her, ought to be in his/her favor. Thus, the first part authorizes the respondent only to support the decree. It does not authorize him to challenge the decree. If he wants to challenge the decree, he has to take recourse to the second part. The second part permits him to take any cross-objection to the decree, which he could have taken by way of appeal. [Ref. to Choudhary Sahu (Dead) by Lrs. V State of Bihar (AIR 1982 SC 98)]. Thus, Order 41, Rule 22 provides two alternatives to the respondent. The first is “to support” the decree, the second is “to attack” the decree. However, the two alternatives are not mutually exclusive to each other.

Secondly, in case the respondent were to file the cross-objection, the same should be filed within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow. Naturally, the period of limitation is, therefore, only on the filing of the cross-objection and not on the first part of the provision.

In the present case, the Special Appeal was admitted on 26-7-1989, the service on Smt. Zohra Begum was effected on 7-4-1991, power on her behalf (the Vakalatnama) was filed on 21-1-1992. However, she did not file her cross-objection till 18-3-2002, i.e. her cross-objections were filed ten years after the service of notice upon her. Although her cross-objection was filed after an inordinate delay and certainly after the period of limitation as prescribed by Order 41, Rule 22 of the Code, yet she has not filed any application for condoning the delay under Section 5 of the Limitation Act. In the absence of such an application, the delay cannot be condoned. Hence, her cross-objection is not maintainable under Order 41, Rule 22 of the

Code. However, under the first part of Order 41, Rule 22 of the Code, she is competent not only to support the impugned judgment, but also to claim that the finding against her by the learned Single Judge in respect of any issue ought to have been in her favour. Thus, under the first part of Order 41, Rule 22 of the Code, Smt. Zohra Begum has a locus standi before this court. Her contentions would have to be discussed and decided.

There is cornucopia of legal issues involved in this case: firstly, whether the 1942 wakf is valid or not? Secondly, in case the 1942 wakf is valid what would be its effect on the Trust deed of 1952? Thirdly, in case the 1942 wakf is valid, what would be its effect on the 1966 wakf? Fourthly, in case the 1942 wakf is invalid, what would be its effect on the Trust deed of 1952 and the 1966 wakf? Fifthly, whether the 1966 wakf is valid or not? Sixthly, is the 1966 wakf a product of misrepresentation and/ or undue influence or not?

But before these legal issues can be answered, it is

imperative to first understand the entire concept, scope and ambit of wakf in Islamic Law and under the statutes governing the field of wakf.

Ameer Ali in his Commentaries on Mahommedan Law opines, “The law relating to Trusts or wakf is by far the most important branch of the Mahommedan Law. The doctrine has been recognized and enforced in the Mussulman system from the earliest times. Historically its origin is traced to the direct prescription of the Prophet. ‘The validity of wakf’, says the Ghait ul-Bayan, ‘ is founded on the rule laid down by the Prophet himself under the following circumstances, and handed down in succession by Ibn ‘Auf, Naf’e and Ibn Omar as stated in the Jam’aa ut-tirmizi (Rev. Edn., 2004: 215)”. Omar Ibn-al-Khattab, on getting a piece of land in the canton of Khyber went to the Prophet and enquired from the Prophet by saying:

O Messenger of Allah! I have got land in Khyber that which I have obtained more valuable property; what does thou advise me?

The Prophet, whereupon, is said to have spoken:

If thou likest make the property itself inalienable and give profits from it to the

Charity....tie up the corpus (asl or corpus) and devote the usufruct to human being and it is not to be sold or made the subject of gift or inheritance; devote its product to your children, your kindred and the poor in the way of God.

Omar, in accordance with the direction of the Prophet, laid down that the property would not be sold, or given away in gift, or inherited but he directed that out of the income of the property, charity should be given to the needy and the relatives, slaves should be set free, provisions should be made for travelers, and guests should be entertained. (I. Mulla. Commentary on Mohammedan Law. Dwivedi Law Agency. Allahabad. 2006) (P. 611) (Emphasis added).

According to the author of Fath ul-Kadir, a work of great authority among the Sunnis, the Prophet said, “all human actions end with the life of the individual, except such benefactions as are perpetual in their character”. Ameer Ali affirms, “The doctrine of wakf is thus interwoven with the entire religious life and social economy of the Mussulmans.” (Ameer Ali., 216).

Dealing with the Hanafi School of Law on wakf, Ameer Ali states, “Wakafa literally means ‘ I have bound up or detained’ ...as the Arabian jurists put it, ‘in the language of the

law', it signifies the dedication or consecration of property, either in express terms or by implication, for any charitable or religious object, or to secure any benefit to human beings. To use the curt but expressive language of the Moslem lawyers a dedication to any good purpose (wujuh-ul-birr-wa'l-ihsan of the Shiahs, or wujuh-ul-khair wa'l-birr of the Hanafis) is a wakf. The terms birr and Khair include all good and pious acts and objects." (Ibid., 217) (Emphasis added).

Abu Yusuf, the great Islamic Jurist of the Hanafi School and whose rule is recognized as law, asserts, "wakf is the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may be applied for the benefit of human beings, and the dedication when once made, is absolute, so that the thing dedicated can neither be sold, nor given inherited". (Ibid., 219)(Emphasis added). "The dedication becomes absolute and the right of the person making it becomes extinguished by the mere fact of his declaration that he dedicates it, or has dedicated it." (Ibid., 219).

During the British Raj, the legal minds debated whether a wakf could be created for the benefit of oneself and one's children, or family, in perpetuity, generation after generation? Or would such a trust amount to aggrandizement of one's family? In the case of *Abul Fata Mahomed Ishak v Russomoy Dhur Chowdhry* ((1894) 22 IA. 76) the Privy Council held if the gifts to charity were substantial, not illusory, the wakfs were valid; but where the wakfs were founded for 'the aggrandizement of a family', or where the gifts to charity were illusory or merely nominal, the wakfs were declared to be void. For two decades, the said decision was followed in India.

However, the said decision caused uproar in India as the said decision was contrary to the saying of Prophet Mohammad. According to Abu Huraira, "The Apostle of God said, 'there is one dinar which you have bestowed in the road of God, and another in freeing a slave, and another in alms to the poor, and another given to your family and children; that is, the greatest dinar in point of reward, which you gave to your family.'" (Ameer Ali, 801). According to Ibn-Mas'ud, "The

Apostle of God said, ‘ when a Mussulman bestows on his family and kindred, for the intention of rewards, it becomes alms, although he has not given to the poor, but to his family and children.” (Ibid., 801).

In Bikani Mia’s case (1892) 20 Cal. 116, Ameer Ali had summarized the position of Islamic Law on this point as under:

A wakf is a permanent benefaction for the good of God’s creatures: the wakif may bestow the usufruct, but not the property, upon whomsoever he chooses and in whatever manner he likes, only it must endure for ever. If he bestows the usufruct in the first instance upon those whose maintenance is obligatory on him, or if he gives it to his descendants so long as they exist to prevent their falling into indigence, it is a pious act—more pious, according to the Prophet, than giving to the general body of the poor. He laid down that one’s family and the descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater ‘reward’ than to bestow on the indigent stranger. And this is insisted upon so strongly that when a wakf is made for the *indigent* or *poor* generally, the proceeds of the endowment is applied to relieve the wants of the endower’s children and descendants and kindred in the first place. When a wakf is created constituting the family or descendants of the wakf (sic, for wakif) the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in *not* for the purpose of making the wakf charitable, (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made), but simply to impart permanency to the endowment. When the wakif’s descendants fail, it *must* come to the poor. So it is

enduring benefaction—an act of *'ibadat* or worship, to use the language of the *Jawahir-u-Kalam*,-- an act by which *kubrbat* or 'nearness' is obtained to the Deity, according to the *Bahr-ur-Raik*.

In order to reverse the damage caused by the decision of the Privy Council in the case of Abul Fata Mahomed's case (supra), the Mussalman Wakf Validating Act VI of 1913 ('the Act of 1913', for short) was enacted. Section 2 of the Act of 1913 is as under:

In this Act, unless there is anything repugnant in the subject or context,--

- 1) "Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.
- 2) 'Hanafi Mussalman' means a follower of Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

Section 3 of the Act of 1913 permitted the creation of a wakf for the following among other purposes:

- (a) for the maintenance and support wholly or partially of his family, children or descendants, and
- (b) where the person creating a wakf is a Hanafi Mussalman, also for his own

maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated;

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

Section 4 further states:

No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating wakf.

Thus, the Act of 1913 brought the law in conformity with the Islamic Jurisprudence on wakf. In the case of Trustees of Sahebzadi Oalia Kulsum Trust v Controller of Estate Duty, A. P [(1998) 6 SCC 267], the Hon'ble Supreme Court expressly overruled the case of Abul Fata Mahomed Ishak (supra).

Thus, "wakf" is an unconditional, irrevocable, perpetual, dedication of property, vested in God, the ownership of the

founder, called 'wakif' is extinguished, the usufruct or profits of the property are used for the benefit of mankind, except for purposes forbidden by Islam. The essential of a valid wakf according to the Hanafi Law are threefold:

- 1) A permanent dedication of any property
- 2) The dedicator (wakif) should be a person professing the Musalman faith and of sound mind and not a minor or lunatic, and
- 3) The dedication should be for a purpose recognized by the Musalman law as religious, pious or charitable. (I. Mulla. 621)
- 4) However, according to the Act of 1913, the wakf can be created for the benefit of the wakif's children, kindred or descendants as long as the ultimate purpose is the benefit of the poor or any religious, pious or charitable work in accordance with Muslim law.

According to these requirements of Hanafi School, any Muslim man or woman, who is not a minor or lunatic, can

create wakf of his movable or immovable property provided the object of the wakf is “religious pious or charitable” in accordance with Muslim Law.

The purpose of creation of wakf is to gain religious merit; the object of the wakf should be “religious, pious or charitable” in accordance with Muslim law. The interpretation of the words “religious, pious or charitable” has led to legal confusion. Hair-splitting distinction has been made between the words “Khair” and “Khairat”: while the former has been interpreted to mean “benevolence”, the latter, to mean “charity”. The courts have noted the etymological differences between these and other similar words. But the words “religious, pious or charitable” have a more vast meaning under the Muslim law than under the common parlance. “Every good purpose which God approves, or by which approach (Kurbat) is attained to Him, is fitting purpose for a valid and lawful wakf.” (I. Mulla., 637). Therefore, only those “works” are barred which does Islamic Law forbid, e.g. construction of temple or church, maintenance of gambling houses or bars, the maintenance of a secular property owned

by the wakif from the earning or profit of the wakf etc.

Therefore, the distinction, which has been maintained in catena of cases between “khair” meaning “benevolence” and “Khairat” meaning “charity”, is futile. For, on the basis of the teachings of the Prophet, the Islamic jurists have not maintained this distinction. According to Mishkat-ul-Masabih “The Apostle of God (Prophet Mohammad) said, ‘Every good act, is charity; and verily it is of the number of good acts, to meet your brother with an open countenance, and to pour water from your own bag into his vessel.’ ” Abu Dhar asserts, “The Apostle of God said, your smiling in your brothers face is charity, and your exhorting mankind to virtuous deeds is alms; and your prohibiting the forbidden, is alms; and your shewing a man the road, in the land in which they lost it, is charity for you; and your assisting the blind, is charity for you; and your removing stones, thorns and bones, which are inconvenient to man, is alms for you.’ ” With these liberal words of the Prophet, the distinction between “Khair” and “Khairat”, between “benevolence” and “charity” disappear. Therefore, as long as the “work” is done for the benefit of mankind, the usufruct is used for the good of human

being—“benefit” and “good” in according with the Islamic Law—the “work” would fall within the category of being “religious, pious or charitable”.

Once the property is declared as ‘wakf’, the owner of the property loses his right of ownership over the property, for the property vests in the Almighty God. The wakif has only the right to appoint a Mutawalli—the Manager or the Superintendent over the property so as to administer the wakf in accordance with the wakfnama. The Act of 1913 does not define the word Mutawalli; the Wakf Act, 1954 (hereinafter, ‘the Act of 1954’, for short) defined it under Section 3 (f) as follows:

“Mutawalli” means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a competent authority to be the mutawalli of a wakf and includes any naib-mutawalli, khadim, mujawar, sajjadanishin, amin or other person appointed by a mutawalli to perform the duties of a mutawalli and, save as otherwise provided in this Act.

The wakif may appoint himself as the first Mutawalli and may fix the order of succession of Mutawalli after him in the wakfnama itself. The wakif may also change the Mutawalli but

only if he has reserved the power to change the Mutawalli with him in the wakfnama. In case, he has not retained such a power, then he cannot change the Mutawalli once the Mutawalli has been appointed or succession of Mutawalli is fixed in the wakfnama. "If the wakif dismisses a mutwalli, if he made a condition (reserving the power of discharging and nominating), such dismissal will be valid by consensus. But if (he did) not (so reserve this power), it will not be valid according to Abu Yusuf. And the jurists of Balkh have adopted Abu Yusuf's rule." (Ameer Ali., 792) Similar passage is also contained in Asaf A. A. Fyzee, Outlines of Muhammadan Law (Oxford University Press: 2005) wherein relying on the case of Siddiq Ahmed v Syed Ahmed ((1945) 49 C.W. N. 311) the learned authors affirms, " Once a mutawalli has been duly appointed, the wakif has no power to remove him form the office." (Pp. 315-316).

Having discussed the scope and ambit of wakf under the Muslim law, now we may turn to the contentions of the learned counsels for the parties. Mr. Bhandari has attacked the 1942 wakf on the ground that it is illusionary, uncertain and vague. A

bare perusal of the 1942 wakf (Ex. 4, in Civil Suit No. 10/71) reveals its salient features:

- 1) The wakf was created “with a view to gain religious recompense and salvation in this world and in the hereafter”. Thus, the religious purpose is present.
- 2) The wakf was created for “providing sustenance to him (wakif—Hakim Sahab) and his descendents. Thus, a family wakf is being created for the maintenance of the wakif himself and for the maintenance of his descendants—a pious, charitable act according to the Prophet and the Islamic Law.
- 3) “endows his property permanently in accordance with the jurisprudence of Hanafi sect and binds all his property directed to the following objectives and foregoes willingly without any pressure or restraint in the name of Almighty all claims to the possessionship (sic) and takes it from the ownership possession to the

trusteeship possession. Now the property is rendered non-transferable and there existed no right to property which could be transferred by way of sale or mortgage or gift (Hibba) and nor rights to heritage issued.” Clearly shows the property shall vest in the Almighty; the wakif shall no longer be the owner, but only have the possession of the property. The property can no longer be transferred, sold or mortgaged or inherited. The wakf is being created for certain objectives. Hence, the property ‘is tied’.

- 4) “The executor will be trustee to endowment and will adorn the office of trusteeship till his life-time and after making deduction for expenditure out of the total income earned from endowed property will be spending it liberally to his will and no one would have objection to it.” Thus, Hakim Sahab appointed himself as the first Mutawalli and created the wakf for his own

maintenance—again a pious objective.

- 5) “one anna per rupee out of the profit from dispensary (dawakhana) will be secured separately under the item charity and virtuous deeds for future reward in the hereafter, whereout (sic) expenditure will be incurred on the annual Fatiha (to read prayers over the dead making offering to the saints) of executor’s father, late Maulvi Abdur Rahman Khan Saheb and mother late Munir Fatima Sahiba and after the death of the executor and his wife will likewise be spent every year so as not to effect expenses more than Rs. 5/- per Fatiha and Rs/ 1/- will be given to a poor relation. Thus, an anna per rupee would be invested out of the profit from Dawakhan which would be spent on repairing the breakage of the dispensary building and the publicity and the division of muradi 14 anna will be in accordance with the details given in the

proviso 10.” The reading of Fatiha has been held to be religious and pious work; a part of the income, howsoever small, would go to the poor also—another pious or charitable act.

- 6) The succession of the Mutawalli is also fixed: “after the death of executor the trusteeship shall go into the charge of executor’s eldest son—Hakim Nasiruddin...After the death of second trustee the future selection will be made as usual that one man, each will be chosen by each family of the executor’s male issues and out of the chosen people lot shall be drawn on two individuals and lot shall be drawn again on each of these two remaining individuals and this drawing of lot shall take place in the presence of all the relatives and will be announced within a week and of the last two individuals on whom the lot shall fall he will be nominated as first trustee and in the event of there arising any controversy decision will

ever be taken by drawing lots and in the event of discontinuance of lineage of male issue, the trusteeship shall return to executor's female issue and after the end of the succession of the female issue the trusteeship will go the Mutawalli (Trustee) Dargah Khwaja Saheb, Ajmer Sharif." Hence, Hakim Sahab did not reserve any power with himself to subsequently change the Mutawalli or succession of Mutawalli.

- 7) In fact, according to Proviso ninth, "If the trustee would indulge in dereliction of duty, or be committing unfair dealing or embezzlement, the male-heirs of the executor by the majority opinion shall have the right to remove the trustee from his office... In the event of removal of the trustee another trustee shall be appointed in consistence with the instruction" mentioned above. Hence, the power of removal of Mutawalli could be exercise only if the

Mutawalli defaulted in his duty. The power was vested with the male-heirs of Hakim Sahab, by majority opinion. Thus, during his lifetime, Hakim Sahab did not have the power to remove the Mutawalli.

8) The Mutawalli (Trustee) Dargah Khwaja Saheb...will first of all spend the income of the endowed property on the women of the family of male issue and if there succession also comes to an end he will continue to spend the income that would be time convenient on benevolence ("Madd-e-khair") items.

9) Proviso tenth provides for the division of profit from the clinic amongst the sons and Hakim Sahab's wife. Likewise, Proviso Fourteenth provides for the division of the portions of his sons' male descendents after the death of the sons.

From the salient features, the following conclusions can be drawn: firstly, a substantial portion of the earning from the wakf is for the maintenance of the wakif and his descendents,

generation after generation. Since the maintenance of oneself and of one's descendants is a pious act, since a substantial portion is being spent on their maintenance, the wakf is not illusory. While Mr. Bhandari has emphasized on the spending of an anna out of rupee on the poor to prove the illusory quality of the wakf, he has overlooked the fact that according to the Islamic jurist the maintenance of oneself and one's family or descendants or kindred is considered the most pious act. Therefore, the wakf is certainly not illusory.

Relaying on catena of cases, Abul Fata Mahomed Ishak & Ors (supra), Balla Mal and Ors v Ata Ullah Khan and Ors (A.I.R. 1927 PC 191), Muhammad Munawar Ali v Razia Bibi and Ors (27 All 327), Musammat Rukeya Banu & Ors v Musammat Nazira Banu & Ors (1927 (105) I.C. 647), the learned counsel has argued that a substantial part of the income should be dedicated for "religious, pious or charitable purpose". In case it is not so dedicated, then the wakf has been held to be illusory in nature, therefore, void. However, the other above noted cases are based on the case of Abul Fata

Mahomed Ishak (supra) decided by the Privy Council. But, in the case of Trustees of Shaebzadi Oalia Kulsum Trust (supra) the Hon'ble Supreme Court has over-ruled the case of Abul Fata Mahomed Ishak (supra). Therefore, all the cases, which were based on the case of Abul Fata Mahomed Ishak, stand impliedly over-ruled. Moreover, in light of the discussion of Islamic law on wakf, as noted above, the cases cited by the learned council are contrary to the tenor and principles of Muslim Law. Thus, the above cases cited by the learned counsel for the appellant do not come to his rescue.

Secondly, the wakf is not uncertain. Although it seems to stress on the profits earned from the clinic, it also contains passages where the wakif has laid down that "the income from the endowed property" shall be spent on the women of the male issues. Thus, the division of the income is not limited to just the income from the clinic. The 1966 wakf also deals with the "income from the endowed property." Another way to interpret the wakf is to hold that while the income generated from the clinic is to be divided in accordance with the directions of the

wakif, but the income generated from the shops and tenants is to be applied for “religious, pious or charitable purpose”.

According to Ameer Ali, “mere vagueness or uncertainty will not lead to the failure of a wakf, for in such a case the law does itself supply the defect by declaring that the trust should be in favour of such objects as approach nearest in character to the intended object of the wakf; or even when that is not expressed, be applied to the support of the poor and needy.”

(Ameer Ali, P. 448). Moulana Zain-ul-‘aabidin Ibrahim in his *Ashbah-wan-Nazair*, a celebrated work, says, “To decide contrary to the conditions of the wakif is tantamount to deciding contrary to the prescriptions of the Lawgiver (Prophet Mohammad), and therefore such decision will not take effect, for the jurists have held unanimously that the conditions laid down by the wakif are like the prescriptions imposed by the Lawgiver.” (Ameer Ali, Pp. 788-789). According to Ameer Ali, “this is well worthy of the consideration of the our Indian Law Courts so apt to run away with their own conceptions of law and equity.” (Ameer Ali, P. 789). Thus, even if Hakim Sahab has not explicitly instructed that the income earned from the endowed

property be spent in a particular manner, considering the tenor of the document, it is crystal clear that the earning from the endowed property would have to be spent on 'religious, pious or charitable purpose'. Hence, there is no uncertainty about the wakf.

Thirdly, merely because discretion has been left to the Mutawalli (Trustee) Dargah Khwaja Saheb to eventually use the income on "benevolent items" (Madd-e-khair) would not render the wakf as vague. As discussed above, any work for the benefit of human beings in accordance with Islamic law comes under "benevolent items" (Madd-e-khair). As pointed out above, the fine distinction between "Khair" and "khairat", between "charity" and "benevolence" is non-existent in Islamic jurisprudence. Therefore, even a "good work" for the benefit of human beings would be pious and charitable work. Hence, the wakf is not vague in its object.

Mr. Bhandari has relied upon *Mariambi v Fatmabai & Ors* (AIR 1929 Bom. 127), *Radhey Shyam & Ors v Radhey Lal*

(AIR 1927 Oudh 213), Ch. Mohammad Afzal & Ors v Ch. Din Mohammad & Ors (AIR (34) 1947 Lahore 117), Faqir Mohammad v Mt. Abda Khatoon (AIR (39) 1952 All. 127) to draw the fine distinction between “Khair” and “Khairat”, between Kar-I-khair” and “Khairati kam”. However, as stated above considering the broad definition of “pious and charitable” as given by the Prophet Mohammad and by the Islamic jurists, the distinction between “Khair” and “Khairat”, between “Kar-I-Khair” and “Khairati kam” is more pedantic and academic than substantial and legal. Thus, the first contention of the learned counsel for the appellant is unacceptable.

Fourthly, the wakf fulfills the essential requirement of a valid wakf under the Hanafi law. It has been created by a Muslim person who was neither minor, nor lunatic at the time of creation of the walk; it is a permanent endowment of the property; immediately after its declaration, the wakif has lost his right of ownership and has only the right of possession; the wakif has appointed himself as the first Mutawalli and has fixed the succession of Mutawalli and has even dealt with the

appointment of Mutawalli in case the Mutawalli fails in his duty as a Mutawalli. Hence, we have no hesitation in holding the 1942 wakf as being in accordance with Muslim law. Since the 1942 wakf has been created for the benefit of the male descendants, it is equally valid under Section 4 of the Act of 1913. Thus, it meets both the requirement of Hanafi School of law and of the statute. Hence, the 1942 wakf is valid.

Fifthly, the wakf was registered under the provisions of the Act of 1954, as is obvious from Official Gazette dated 23-9-1965 (Ex. 3 in Civil Suit No. 10/71). Therefore, a reasonable presumption can be drawn that it fulfilled the requirement of being a valid wakf. Furthermore, according to Section 6 (4) of the Act of 1954, "the list of wakfs published under sub-section (2) of Section 5 (in the Official Gazette) shall, unless it is modified in pursuance of a decision of the civil court under sub-section (1), be final and conclusive." Thus, after the publication of the 1942 wakf in the Official Gazette, the wakf is final and conclusive. Although the civil court had declared the wakf to be invalid on the ground of being illusory, uncertain and vague,

we declare the 1942 wakf to be valid as it is in accordance with the requirement of Hanafi law and the Act of 1913.

Since the 1942 wakf is valid, the next question is with regard to the validity of the 1952 Trust deed. As pointed out above, Hakim Sahab had not only fixed the succession of Mutawalli, but had also laid down the removal of Mutawalli in case the Mutawalli functioned unbecoming of his post. Since Hakim Sahab did not reserve the power to change the Mutawalli with himself, he could not have changed the Mutawalli by executing the 1952 Trust Deed. In light of the law discussed above, clearly the 1952 Trust Deed is illegal. Hence, the appointment of Smt. Zohra Begum as the Mutawalli was illegal. Thus, she does not derive any interest in the suit property. Therefore, the learned trial court had rightly dismissed her suit. We, thus, also uphold the part of the impugned judgment whereby her cross-objections have been dismissed.

Moreover, once the 1942 wakf is held to be valid, Hakim Sahab was no longer the owner of the suit property. The suit

property is deemed to have vested in the Almighty. He was merely the Mutawalli. According to his own statement, the endowed property could not be alienated, transferred, sold, mortgaged or inherited. He had shifted from right of ownership to right of trusteeship. One of the essential requirements of a valid wakf is that the donor should own the property. But as a Mutawalli, Hakim Sahab was not the owner of the property. Therefore, he could not have created another wakf with regard to the same property. For, once a wakf is always a wakf (Ref. to Sayyed Ali and Ors v A. P. Wakf Board, Hyderabad & Ors (1998) 2 SCC 642). Hence, the 1966 wakf is equally illegal.

Let us assume, for the sake of arguments, that the 1942 wakf is invalid, then is the 1966 wakf still valid? A holistic examination of the evidence brings out the following points: firstly, the Hakim Sahab had no desire to part with his control over the property during his life-time. In the 1942 wakf (Ex. 4 in the Civil Suit No. 10/71), in the 1952 Trust Deed, in the will dated 15-7-1966 (Ex. 14) in favour of the appellant, in the 1966 wakf (Ex. 4 in the Civil Suit No. 9/71), in the will dated 14-4-

1968 (Ex. 15) in favor of Gaffar Khan, and lastly in the will dated 5-6-1968 (Ex. D. 9), Hakim Sahab has kept the control over the property with himself. The Mutawalliship or the property devolves to the other persons only after his death.

Secondly, a perusal of the documents mentioned above, from 1952 to 1968 clearly reveal that Hakim Sahab was under an impression that since his children have migrated to Pakistan, therefore, they would not have any right to inherit the property left by him in Ajmer. For, the constant refrain in the above-mentioned documents is “ I have no heir in India and there is no one to claim any interest in this property after my death. I am entitled to dispose off my said property in any way I like.”

Thirdly, according to D. W. 2, Mehboob Khan, Hakim Sahab had asked P.W. 10, Haji Hasan Abedi, the lawyer for the appellant who came to meet Hakim Sahab in Ajmer, if the house could be mutated in the name of his children. But, Haji Abedi had said “no it could not be done”. According to P.W. 10

Haji Hasan Abedi, there was no such discussion between him and Hakim Sahab. But even otherwise, considering the fact that from the very beginning the appellant had maintained that the will dated 15-7-1966 (Ex. 14) was flawed as Hakim Sahab had bequeathed his entire property in favor of the University, something he could not have done under the Islamic Law, it was the duty of Haji Hasan Abedi to clarify the point about the children inheriting the property in India even if they have migrated to Pakistan. The fact that in all the documents mentioned above from 1952 to 1966, Hakim Sahab had made a provision for his children to come and stay in the house in case they were to come to Ajmer, clearly shows that he wanted his children to have some sort of interest or relationship with the property. Thus, P. W. 10 did not reveal a vital fact to Hakim Sahab when the 1966 wakf was under discussion between the two. Hence, Hakim Sahab was kept in the dark about the true facts that were vital for his decision-making.

Fourthly, Mehboob Khan, D. W. 2, was Hakim Sahab's servant from 1948 onwards. He was helping Hakim Sahab in

preparing the medicines. According to this witness when the persons from the Aligarh University came to Hakim Sahab, he was present there. He tells us, "Four persons had come. They had already prepared the papers. They did not read the papers to Hakim Sahab before me. Hakim Sahab signed the papers in front of me. They told him, there are some difficulties in the paper, which need to be corrected before the papers are signed. But they did not correct the papers. Hakim Sahab was not keeping well; therefore, he signed the papers and told them to do whatever they like. Hakim Sahab asked them if the house could be mutated in the name of his children. They told him it couldn't be done." A bare perusal of his testimony shows that he is an independent witness. Although the witness was residing in the suit property, but he has no interest with any of the parties before the court. Moreover, when the 1966 wakf was executed Hakim Sahab was an old man of 85 years. He was in the twilight zone of his life. According to this witness, Hakim Sahab was not keeping well. Furthermore, when Mohammad Ahsan (P. W. 8) and Haji Hasan Abedi (P. W. 10) came to Hakim Sahab, they had already prepared the papers. They told

Hakim Sahab that certain corrections had to be made, but they did not correct the papers. Lastly, Hakim Sahab had signed the paper, without any discussion. In fact, he had told the persons from Aligarh “to carry out the necessary corrections”, but the corrections were not made in front of Hakim Sahab. His testimony throws doubt about the validity of the 1966 wakf.

Fifthly, according to P. W. 3, Mohammad Islamullah, Hakim Sahab did not know the English language. Even P. W. 10, Haji Hasan Abedi admits this fact in his cross-examination. Yet, surprisingly, the 1966 wakf was drafted in English. Of course, P.W. 10, Haji Abedi has tried to explain this anomaly by stating in his cross-examination “Hakim Sahab told him that it is not usual in Ajmer to write documents in Urdu. The documents are written either in English or in Hindi. I was not familiar with Hindi. Therefore, in accordance with Hakim Sahab’s intention, I drafted the document in English.” However, this explanation is unacceptable. For, he does not say that Hakim Sahab insisted that the wakfnama be written in English. Moreover, the 1942 wakf was drafted in Urdu and was registered by the Sub-

Registrar. Moreover, Ajmer has a sizable Muslim population amongst whom Urdu was the language in use. Therefore, the possibility that the 1966 wakf was intentionally drafted in English—a language unknown to Hakim Sahab—cannot be ruled out.

Sixthly, according to P.W. 3 Mohammad Islamullah, P.W. 8, Mohammad Ahsan and P.W. 10, Haji Abedi, the document was not only read over to Hakim Sahab, but it was also translated into Urdu for his understanding prior to his signing the document. However, according to D. W. 2, Mehboob Khan, the document was neither read over to Hakim Sahab, nor translated in Urdu for his understanding. P.W. 3, P. W. 8 and P.W. 10 are witnesses from the side of the appellant. P.W. 8 is an employee of the University; P. W. 10 is their counsel. The brother of P.W. 3 is also an employee of the University. Hence, these witnesses are interested witnesses. Their testimony has not been corroborated by anyone else. However, D. W. 2 was Hakim Sahab's employee and an employee for a long standing. Although he has been arrayed as a respondent, but he has

nothing to loose even if the appellant were to win the case. Therefore, he is an independent witness. Thus, we are more inclined to accept his testimony as closer to truth. Considering his testimony, the wakfnama was not read or explained to Hakim Sahab prior to signing the document. Thus, Hakim Sahab did not know the contents of the wakfnama.

Seventhly, Hakim Sahab, in his testimony dated 29-3-1967 (Ex. A/10) made before the Small Cause Court, clearly stated that he has not created a wakf, but has given the property to the university through a will. Thus, Hakim Sahab was under a bona fide impression that he has bequeathed the suit property through a will and not through a wakf intervivos. Most importantly, this was the first expression of Hakim Sahab immediately after the 1966 wakf was signed by him. This clearly reveals his mental impression. Thus, Hakim Sahab seems to have signed the 1966 wakf under the bona fide belief that he is signing a will in favor of the appellant and not a wakf intervivos.

Eighthly, on 5-6-1968, Hakim Sahab sent a legal notice

(Ex. A/14) through Madan Singh (D.W. 3) repudiating the 1966 wakf. In the said notice Hakim Sahab's counsel has clearly stated that "a wakf deed was also dishonestly, fraudulently and deceitfully got executed and signed by the client in favor of Muslim University, Aligarh on 28-9-66 and got registered on 28-10-66 before the Sub Registrar, Ajmer". Madan Singh (D.W. 3) has proven the said notice in his testimony.

Lastly, even in the will dated 5-6-1968 (Ex. D. 9), Hakim Sahab has clearly stated, " I also revoke the Will executed by me in favour of Muslim University, Aligarh and also the alleged 'Wakf' deed executed by me on 28-10-1966, which was to come into operation after my death and which was also got executed by force and fraud and by deceitful means from me." Thus, Hakim Sahab has himself stated that the 1966 wakf was the result of fraud and deceit. For these reasons, we also hold that the 1966 wakf is illegal and therefore, unsustainable. Although we do not agree with the learned Single Judge that Hakim Sahab was suffering from any legal infirmity, but we do agree with the conclusion of the learned Single Judge that the

1966 wakf is a product of misrepresentation, undue influence and possible fraud. Hence, it is unsustainable.

Since we have held the 1942 wakf to be valid, obviously, Hakim Sahab could not have bequeathed the suit property to Respondent No. 1 through the will dated 5-6-1968. For, he was no longer the owner of the property, but was only a trustee. Thus, the will dated 5-6-1968, too, is invalid. Therefore, Respondent No. 1 cannot claim a title over the suit property on the basis of the said will.

For the reasons stated above, this appeal has no force. It is, hereby, dismissed. There shall be no order as to costs.

R. S. Chauhan J.

R. M. Lodha J.